Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-03(IM)(NCC)-56–07 OF 2016 AND W-03(IM)(NCC)-65–07 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
20 JUNE 2017

Bankruptcy — Bankruptcy notice — Setting aside — Respondent filed two separate bankruptcy notices against both appellants — First appellant sued as principal borrower and second appellant sued as guarantor — Whether respondent entitled to sue both appellants — Whether appellants jointly and severally liable — Whether second appellant liable as guarantor — Whether summary judgment against appellants could be enforced against any one or both the judgment debtors

These appeals were against the decision of the High Court. The respondent sued both appellants before the sessions court for monies outstanding under a friendly loan arrangement of RM325,800 ('the loan agreement'). The appellant in the first appeal, Sumathy a/p Subramaniam ('Sumathy') was sued as the principal borrower while the appellant in the second appeal, Gunaseelan a/l Tangiah ('Gunaseelan') was sued as the guarantor. The respondent had filed two separate bankruptcy notices against both appellants. The appellants then filed separate applications to set aside the bankruptcy notice, both relying on the same ground: that the sum specified was more than what the respondent was legally entitled to under the terms of a summary judgment and that the summary judgment did not specify that the appellants, as judgment debtors, were 'jointly and severally liable', the judgment debtors must then be equally liable for judgment sum, ie each judgment debtor should only be liable; for half the judgment sum. The applications were heard by two different senior assistant registrars, the applications were allowed and the notices were set aside. However, the High Court found that: (a) since Gunaseelan had guaranteed repayment of the loaned sum under the loan agreement, the respondent was entitled to sue both Gunaseelan and Sumathy in the event Sumathy did not pay; (b) the respondent had a cause of action against both the appellants and may pursue that line of action against both of the appellants by either suing Gunaseelan with Sumathy in a 'joint action' or by a 'separate action against them individually'; (c) consequently, the summary judgment against them 'can be enforced against any one or both the judgment debtors'; and (d) Gunaseelan was liable, as a guarantor, to pay the whole sum in the event Sumathy failed to pay the loan sum stated in the judgment.

Held, allowing both appeals, setting aside the decision of the learned High

Court judge and restoring the decision of the learned senior assistant registrars:

(1) In view of the quasi-criminal nature of bankruptcy proceedings, the requirements of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 must be strictly complied with. A judgment debtor must be fully aware of what exactly was the act of bankruptcy that he was alleged to have committed. Where the act was over a non-payment of a judgment debt, the appellant debtor must not be left uncertain of the exact amount of the debt due. From the terms of judgment, it could not be that both appellants were required to pay exactly the same sum. As joint debtors, each could only be required, under the law and as ordered by the court, to pay the sum stipulated, jointly and in equal proportions (see para 24).

(2) The court could not agree with the learned High Court judge's findings that the amount that each appellant, as judgment debtor, was required to pay was only relevant at the time of discharge, and not at the time of issuance of the bankruptcy notice or even the creditor's petition. The basis for petitioning a person to be adjudged a bankrupt must be done responsibly based on sound grounds. The debt must be clear and unequivocal. The terms of the summary judgment could not convey the meaning that the appellants were jointly and severally responsible for the non-payment of the loan. The loan agreement did not provide for such terms, neither did the respondent's statement of claim including its reliefs and certainly not the summary judgment (see para 25).

(3) The court could not infer that appellant's liability to be joint and several as such a reading would go against the plain terms of the judgment. There were no express terms in the loan agreement indicating that the parties had agreed that the liability of the borrower and the guarantor was joint and several. Therefore, it would be contrary to the contractual agreements reached between parties if the court were to read the liability of the appellants as joint and several. The appellants could not be expected to each pay the same sum and then seek correction from the official assignee when seeking a discharge. The bankruptcy notices were indeed invalid. The two bankruptcy notices had similar terms and the same amount. Clearly, the sum stipulated in both bankruptcy notices were inaccurate and did not accord with the terms of the summary judgment (see paras 26–27).

[Bahasa Malaysia summary

Rayuan-rayuan ini adalah terhadap keputusan Mahkamah Tinggi. Responden telah menyaman kedua-dua perayu di hadapan mahkamah sesyen bagi wang yang tertunggak di bawah satu pinjaman persahabatan berjumlah RM325,800 ('perjanjian pinjaman'). Perayu dalam rayuan pertama, Sumathy a/p Subramaniam ('Sumathy') telah disaman sebagai peminjam prinsipal manakala perayu dalam rayuan kedua, Gunaseelan a/l Tangiah ('Gunaseelan')

telah disaman selaku penggerenti. Responden telah memfailkan dua notis kebankrapan secara berasingan terhadap kedua-dua perayu. Perayu-perayu pula telah memfailkan permohonan-permohonan secara berasingan untuk mengenepikan notis kebankrapan tersebut, kedua-duanya bergantung pada alasan yang sama: bahawa jumlah yang dinyatakan adalah lebih daripada apa yang responden berhak menerima secara sah di bawah terma-terma satu penghakiman terus dan penghakiman terus tidak menyatakan bahawa perayu-perayu, sebagai penghutang-penghutang penghakiman, bertanggungan secara bersesama dan berasingan, penghutang-penghutang penghakiman oleh itu sama-sama bertanggungjawab ke atas jumlah penghakiman, dalam erti kata yang lain setiap penghutang penghakiman bertanggungjawab, hanya kepada sebahagian daripada jumlah penghakiman. Permohonan-permohon telah didengar oleh dua penolong kanan pendaftar yang berasingan, permohonan-permohonan telah dibenarkan and notis-notis telah diketepikan. Bagaimanapun, Mahkamah Tinggi memutuskan bahawa: (a) memandangkan Gunaseelan telah menjamin bayaran balik jumlah pinjaman di bawah perjanjian pinjaman, responden berhak untuk menyaman kedua-dua Gunaseelan dan Sumathy jika Sumathy tidak membayar; (b) responden mempunyai kausa tindakan terhadap kedua-dua perayu dan boleh mengusulkan tindakan terhadap kedua-dua perayu samada secara menyaman Gunaseelan bersama Sumathy melalui satu 'tindakan bersama' atau melalui satu 'tindakan berasingan terhadap mereka secara individu'; (c) oleh yang demikian, penghakiman terus terhadap mereka 'boleh dikuatkuasakan ke atas salah satu atau kedua-dua penghutang penghakiman'; dan (d) Gunaseelan adalah bertanggungan, sebagai penjamin, untuk membayar kesemua wang jika Sumathy gagal untuk membayar jumlah pinjaman seperti yang dinyatakan dalam penghakiman.

Diputuskan, membenarkan kedua-dua rayuan, mengenepikan keputusan Hakim Mahkamah Tinggi dan mengekalkan keputusan penolong-penolong kanan pendaftar:

(1) Memandangkan sifat kuasi-jenayah prosiding-prosiding kebankrapan, keperluan-keperluan Akta Kebankrapan 1967 dan Kaedah-Kaedah Kebankrapan 1969 harus tegas dipatuhi. Seseorang penghutang penghakiman harus mempunyai kesedaran penuh apakah sebenarnya tindakan kebankrapan yang kononnya telah dilakukan oleh beliau. Di mana ianya berkenaan satu tindakan tidak membuat bayaran bagi satu hutang penghakiman, perayu yang berhutang seharusnya tidak dibiarkan dalam keadaan tidak pasti tentang jumlah sebenar hutang yang terakru. Dari terma-terma penghakiman, ianya tidak mungkin bahawa kedua-dua perayu harus membayar jumlah yang sama. Sebagai penghutang-penghutang bersama, setiap dari mereka hanya diperlukan, di bawah undang-undang dan sepertimana diperintahkan oleh mahkamah, untuk membayar jumlah yang ditentukan, secara bersama

dan dalam perkadaran yang sama (lihat perenggan 24).

(2) Mahkamah tidak bersetuju dengan penemuan-penemuan hakim Mahkamah Tinggi bahawa jumlah setiap perayu, sebagai penghutang penghakiman, harus dibayar hanya relevan pada pelepasan, dan bukan pada masa pengeluaran notis kebankrapan mahupun petisyen pemiutang. Alasan untuk mempetisyen supaya seseorang itu dihakimkan sebagai seorang bankrap harus dilakukan secara bertanggungjawab atas alasan-alasan yang wajar. Hutang tersebut harus jelas dan tidak berbelah bagi. Terma-terma penghakiman terus tidak boleh bermaksud untuk menyampaikan bahawa perayu-perayu bertanggungan secara bersesama dan berasingan atas alasan tidak membuat bayaran balik pinjaman. Perjanjian pinjaman tidak memperuntukkan terma-terma sedemikan, dan ini tidak dinyatakan dalam penyata tuntuan responden termasuk relif-relifnya dan lebih-lebih lagi dalam penghakiman terus (lihat perenggan 25).

(3) Mahkamah tidak dapat membuat kesimpulan bahawa kebertanggungan perayu adalah secara bersesama dan berasingan kerana kesimpulan sedemikian adalah bertentangan terma-terma jelas penghakiman. Tidak ada terma-terma jelas di dalam perjanjian pinjaman yang menunjukkan bahawa pihak-pihak telah bersetuju bahawa tanggungan peminjam dan penggerenti adalah bersesama dan berasingan. Oleh itu, ianya akan bertentangan kepada perjanjian-perjanjian kontrak yang dicapai di antara pihak-pihak jika mahkamah mengambil kesimpulan bahawa tanggungan perayu-perayu adalah bersesama dan berasingan. Perayu-perayu tidak boleh dijangka bahawa setiap dari mereka akan membayar jumlah yang sama dan kemudiannya akan memohon pembetulan dari pegawai pemegang harta apabila memohon satu pelepasan. Notis-notis kebankrapan memang tidak sah. Kedua-dua notis kebankrapan mempunyai terma-terma yang hampir sama and jumlah yang sama. Jelas, bahawa jumlah yang dinyatakan dalam kedua-dua notis kebankrapan adalah tidak tepat dan tidak menurut terma-terma penghakiman terus (lihat perenggan 26–27).]

Notes

For cases on setting aside, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3337–3339.

Cases referred to

Abu Bakar Ismail; Ex Parte Alliance Investment Bank Berhad, Re [2011] 1 LNS 1688, HC (refd)

Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor [2006] 4 MLJ 451; [2006] 2 CLJ 723, HC (refd)

A *Dato Elamaran M Sabapathy; Ex P RHB Bank Bhd, Re* [2010] MLJU 1424; [2011] 10 CLJ 262, HC (refd)
J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177; [2000] 3 CLJ 104, CA (refd)
Lim Koon Chow v Ambank (M) Sdn Bhd [2012] 8 MLJ 285, HC (distd)
B *Yeo Ah Wang lwn UMBC Bhd* [1991] 1 AMR 38 (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1), (1)(i), (2)
C Bankruptcy Rules 1969

Appeal from: Bankruptcy Case Nos 29NCC-5265–11 of 2015 and 29NCC-5272–11 of 2015 (High Court, Kuala Lumpur)

M Manoharan (Paralakodi a/p Nadarajah with him) (M Manoharan & Co) for
D *the appellant.*
S Prema a/p Subramaniam (Sumitra Prema & Assoc) for the respondent.

Mary Lim JCA (delivering judgment of the court):

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[1] These two appeals, Civil Appeal No W-03(IM)(NCC)-56–07 of 2016 ('the first appeal') and Civil Appeal No W-03(IM)(NCC)-65–07 of 2016 ('the second appeal') were heard together just as they were similarly heard in the court below since they arose from the same facts and involved common parties.
F We allowed the appeals after considering the submissions of both learned counsel. These are our reasons.

BACKGROUND FACTS

G **[2]** The respondent sued both appellants before the Sessions Court at Kuala Lumpur in Civil Action No A52NCC-362–02 of 2015 for monies outstanding under a friendly loan arrangement of RM325,800. The appellant in the first appeal, Sumathy a/p Subramaniam ('Sumathy') was sued as the principal borrower while the appellant in the second appeal, Gunaseelan a/l
H Tangiah ('Gunaseelan') was sued as the guarantor. On 4 September 2016, the respondent entered summary judgments against both appellants. The terms of the summary judgment which is the same in respect of both appellants, inter alia, are as follows:

I > Defendan hendaklah membayar kepada plaintif iaitu Jumlah Penghakiman sebanyak RM291,800, faedah pada kadar 5% setahun dari tarikh 22.11.2014 hingga tarikh Penghakiman, faedah pada kadar 5% setahun dari tarikh Penghakiman sehingga penyelesaian penuh dan kos sebanyak RM4,000.

[3] On 16 November 2015, the respondent filed two separate bankruptcy notices against both appellants. In each bankruptcy notice, the same judgment sum of RM291,800 together with the sum of RM14,504.85 as interest at the rate of 5%pa and the sum of RM4,000 as costs, was specified as the unpaid debt. The total sum being RM310,304.85.

[4] On 26 January 2016, both appellants filed separate applications to set aside the bankruptcy notices; the ground relied on however, was the same; that the sum specified therein was more than what the appellant was legally entitled to under the terms of the summary judgment. The appellants argued that given that the terms of the summary judgment did not specify that the appellants, as judgment debtors were 'jointly and severally liable', the judgment debtors must then be equally liable for the judgment sum. In other words, each judgment debtor should only be liable for half of the judgment sum.

[5] The applications were heard by two different senior assistant registrars ('SAR') on 30 March 2016. Both learned SARs allowed the applications and the notices were set aside. According to the learned High Court judge, the learned SARs were of the view that the judgment obtained by the respondent/judgment creditor or JC was 'open ended as it did not specifically state the exact amount or portion that each JDs are liable. Further both the learned senior assistant registrars are of the view that the amount owed should be divided equally between the JDs'. The respondent appealed.

DECISION OF THE HIGH COURT

[6] The High Court allowed the appeal. It was the finding of the High Court that since Gunaseelan had guaranteed repayment of the loaned sum under the friendly loan agreement dated 30 June 2011 ('the loan agreement'), the respondent was entitled to sue both Gunaseelan and Sumathy in the event Sumathy did not pay. The respondent had a cause of action against both of the appellants and it may pursue that line of action by either suing Gunaseelan with Sumathy in a 'joint action', or by a 'separate action against them individually'. Consequently, the summary judgment that was entered against them 'can be enforced against any one or both the JDs'. The learned High Court judge added that since the summary judgment referred to Sumathy and Gunaseelan as 'defendant', the respondent 'can proceed with one action against both the JDs at the same time or two separate actions against both of them individually. The cause of action against any one of the JD is not discharged if judgment (sic) entered against the other'. Her Ladyship adopted the decision in *Lim Koon Chow v Ambank (M) Sdn Bhd* [2012] 8 MLJ 285, holding that Subramaniam was liable, as a guarantor, to pay the whole sum in the event Sumathy failed to pay the loan sum or the sum stated in the judgment. Finally, Her Ladyship held that 'how much each of the JDs has to pay from the whole

amount stated in the judgment will only be relevant if they ('the JDs') apply for their discharge from the bankruptcy which will come under the purview and consideration of the official assignee and the JC as creditor in the bankruptcy'.

OUR DECISION

[7] With respect, we cannot agree with the learned High Court judge. While the remarks and observations of the learned High Court judge on the general principles were correct, Her Ladyship had fallen into error in failing to examine the real issue under consideration.

[8] The appellants were before the court to set aside the two bankruptcy notices. In order to do that successfully, the appellants will have to show that they have valid challenges under sub-s 3(2) of the Bankruptcy Act 1967. Section 3(1) deals with the various acts which under the law, amounts to acts of bankruptcy while sub-s 3(2) deals specifically with the contents of a bankruptcy notice. Subsection 3(2) reads as follows:

> (2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice —
>
> (i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to or done to the satisfaction of the creditor; and
>
> (ii) *shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time;*
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> (iii) *allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake*; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein. (Emphasis added.)

[9] From the terms of sub-s 3(2), it is evident that the validity of a bankruptcy notice may be challenged by a judgment debtor on the basis that there is a mistake in the amount specified in the notice. Even then, the dispute has to be that the amount stipulated in the notice exceeds that which is actually due and owing to the judgment creditor. But before the judgment debtor can raise that dispute, the judgment debtor is required to notify the judgment creditor within the time prescribed. In *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 3 CLJ 104, this court had decided that:

A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (i) to s 3(2) of the Act. Hence, he must, within the time prescribed in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it mistakenly claims an amount larger than that lawfully due.

[10] That time period is to be found in sub-s 3(1)(i) which reads:

> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not *within seven days after service of the notice* in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purposes of this paragraph and of s 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

[11] In the instant appeals, there are no procedural complaints. What concerns both appellants is the amount specified in the respective notices. Both appellants dispute the amount therein.

[12] It is the argument of both appellants that while the respondent may be entitled to enter judgment for the same single sum, which the respondent did, the liability of each of them is necessarily joint. This is because the summary judgment that was entered has not specified that both appellants are jointly and severally liable for that single sum. Where the judgment is silent or has not specified that liability is joint and several, the liability is necessarily joint. Where liability is joint, each of the appellant as defendant, shares that liability equally — see *Re Dato Elamaran M Sabapathy; Ex P RHB Bank Bhd* [2010] MLJU 1424; [2011] 10 CLJ 262. And so, when it comes to enforcing the judgment, the respondent has a right to enforce only half the judgment sum against each appellant. The respondent is not entitled to enforce the full sum against both of them, certainly not at the same time.

[13] We agree with the submissions of learned counsel for the appellants.

[14] The starting principle in insolvency applications is the act of bankruptcy. The purported act of bankruptcy here is the unpaid judgment debt. A summary judgment, as is the case here, has equal force and validity with any judgment pronounced after a full trial. That judgment, regardless summary or final, until it is varied or set aside, forms the bedrock of the order adjudicating an individual person as a bankrupt. We must stress that in dealing with the issue of whether the appellants have raised a proper dispute under sub-s 3(2) of the Bankruptcy Act as to the validity of the bankruptcy notices, we make no determination on the merits of the summary judgments entered or even on the respondent's cause of action against the appellants. The cause of action has merged in the summary judgments entered and these judgments are final and binding on, especially the appellants.

[15] The terms of any judgment order is entirely one of discretion of court though in a summary judgment, those terms generally follow the terms sought by the plaintiff. In this case, the respondent, as plaintiff, entered summary judgment in terms as appearing in its statement of claim. The relevant terms of the summary judgment have already been set out above. The issue is the nature of each appellant's liability in meeting the judgment sum. Following from that is the issue of whether the sum expressed in the bankruptcy notices is more than the sum actually owed by each appellant under the judgment.

[16] As expressed by Varghese George JC (as he then was) in *Re Dato Elamaran M Sabapathy; Ex P RHB Bank Bhd*, 'in the absence of the judgment spelling out expressly that the defendants were jointly and severally liable to the plaintiff, the judgment there has, as in the ordinary course, to be a judgment imposing joint liability or obligation on the three defendants to meet the judgment sum together. In such event the JD's obligation is only one-third the amount of the judgment sum and not as set out in the bankruptcy notice, or for that matter in the creditor's petition'.

[17] In coming to his decision, Justice Varghese George had relied on an earlier decision of *Yeo Ah Wang lwn UMBC Bhd* [1991] 1 AMR 38. In *Yeo Ah Wang lwn UMBC Bhd*, Shaik Daud J (as he then was) had similarly held that since the judgment was obtained against all three defendants in that case, the defendants were jointly liable. Consequently, the bankruptcy notice which was issued against only one defendant and even then it was for the whole of the judgment sum was set aside as it was not in accord with the terms of the judgment:

> Dalam rayuan ini mahkamah mendapati sebenarnya penghakiman bertarikh Ogos 8, 1992, itu adalah terhadap tiga defendan dan ketiga-tiga mereka diperintahkan sesama membayar sejumlah wang kepada plaintif. Oleh itu mahkamah bersetuju

bahawa dengan plaintif mengeluarkan notis kebankrapan terhadap salah seorang defendan sahaja adalah satu tindakan yang tidak mengikuti atau berdasarkan penghakiman tersebut.

[18] It was His Lordship's view that a bankruptcy notice must accord with or follow the terms of the judgment or order. The bankruptcy notice must not deviate from those terms otherwise it risks losing its validity.

[19] We agree with that reasoning. It is precisely because a successful plaintiff, who subsequently stands as a judgment creditor, does not wish to find himself in the position that would result where liability is joint, that he may only seek recovery in equal proportions against each defendant, that he negotiates on terms of joint and several liability. That nature of liability is carried through to enforcement of any judgment that may be entered. But, where those are not the terms of contract or the pleaded case, or worse, where the judgment is not entered on terms of the defendants being jointly and severally liable, the court, in particular the enforcement court, cannot be called to address and interpret the judgment in terms which are simply not there. That would require the court to go behind the judgment and as stated earlier, quite apart from that not being the function of the enforcement court, the cause of action has already merged into the judgment obtained.

[20] This, therefore, puts paid to the respondent's contention that because Gunaseelan is a guarantor to the friendly loan given by the respondent to Sumathy, Gunaseelan is jointly and severally liable with Sumathy, the principal debtor; and that that position remains until enforcement of the judgment. Gunaseelan is liable to pay the whole judgment sum inasmuch as Sumathy is, especially where Sumathy has not made any payments, and that he is not discharged and he must pay the full sum relying on *Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor* [2006] 4 MLJ 451; [2006] 2 CLJ 723.

[21] Having examined the decision in *Alliance Bank Malaysia Bhd*, it is clear that the decision is not directly on point. In that case, judgment in default was entered against one of two defendants. Although the claim against the defendants was premised on joint and several liability, that was not reflected in the reliefs sought and in the default judgment that was entered. The plaintiff later sought to proceed with its action against the other defendant. It was in defence to this later action that the principle of joint and several liability was discussed. It was the view of Ramly Ali J (as he then was) that:

The fact that the said judgment in default dated 25 January 2005 against the second defendant as well as the prayer in the plaintiff's statement of claim do not state or insert the words 'jointly and severally' does not in any way change the position. The plaintiff's right on the cause of action against both the defendants either jointly or

A individually (ie severally) still survives. The plaintiff can always proceed against the first defendant even though a final judgment in default had been entered against the second defendant.

B **[22]** Similarly, the facts and circumstances in *Lim Koon Chow v Ambank (M) Sdn Bhd* [2012] 8 MLJ 285 are quite different. There, the High Court was asked to set aside a bankruptcy notice on the basis that the sum stipulated therein was not due and recoverable from the judgment debtor as the entire bankruptcy proceedings was premised upon a joint judgment by the learned JC against the judgment debtor and two others. After examining the terms of the C judgment, the learned High Court judge held that the bankruptcy notice was valid because:

> As for me I cannot see how a judgment entered against all three defendants ... cannot be enforced against anyone or more or all of them for the words of the D judgment when translated into English read:
>
> > IT IS THIS DAY ADJUDGED that the first defendant, the second defendant and the fourth defendant do pay the plaintiff:
> >
> > (i) the sum of RM21,615,617.23 ...
>
> E The JC always has a choice to decide which of the three defendants to proceed against with respect to execution.

[23] In an earlier decision of *Re Abu Bakar Ismail; Ex Parte Alliance Investment Bank Berhad* [2011] 1 LNS 1688, Justice Lee Swee Seng took the F view that 'even without the words 'jointly and severally' in the body of the judgment, there is no ambiguity as to how much the plaintiff as judgment creditor can proceed against each one of the judgment debtor either alone or together or against all the three of them'. His Lordship opined that 'For purposes of discharged as a bankrupt later on, it would of course be relevant G that there are other judgment debtors for the same debt who perhaps have not contributed towards payment of the judgment debtor and that the JD here has been shouldering the brunt and the full burden of it. The official assignee can of course take this into consideration in consenting to the JD's application to be discharged'. On the insistence of the JD, His Lordship then proceeded to H take 'a cursory glance at the pleading'; and having done so, concluded that 'any ambiguity alleged quickly vaporises'.

[24] In the present appeals, the respondent chose to initiate bankruptcy proceedings against both judgment debtors at the same time. In both I bankruptcy notices, the respondent claimed that the judgment debtor owes the same sum as appearing in the default judgment. In view of the quasi-criminal nature of bankruptcy proceedings, the requirements of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 must be strictly complied with. A judgment debtor must be fully aware of what exactly is the act of bankruptcy

that he is alleged to have committed. Where the act is over a non-payment of a judgment debt, the appellant debtor must not be left uncertain of the exact amount of the debt due. From the terms of the judgment, it cannot be that both appellants are required to pay exactly the same sum. As joint debtors, each can only be required, under the law and as ordered by the court, to pay the sum stipulated, jointly and in equal proportions.

[25] We cannot agree with the learned High Court judge who found that the amount that each appellant, as judgment debtor, is required to pay is only relevant at the time of discharge, and not at the time of issuance of the bankruptcy notice or even the creditor's petition. The adjudication of any person as a bankrupt is a serious and sombre act; it has far reaching effects, affecting not just the person's daily affairs, doing of business or occupation but also his movements, especially egress and ingress of the country. The basis for petitioning a person to be adjudged a bankrupt must be done responsibly based on sound legal grounds. Since the act of bankruptcy here is the non-payment of a judgment debt, that debt must be clear and unequivocal. From our reading of the terms of the summary judgment, it cannot convey the meaning that the respondent claims, that the appellants are jointly and severally responsible for the non-payment of the loan. The loan agreement in question does not provide for such terms, neither does the respondent's statement of claim including its reliefs and certainly, not in the summary judgment.

[26] From what we can see of the summary judgment dated 4 September 2015, it is plain that it pronounces both appellants liable and that their liability is joint. We cannot read or infer the appellants' liability to be joint and several as such a reading would go against the plain terms of the judgment. In any event, there are no express terms in the loan agreement indicating that the parties have agreed that the liability of the borrower and the guarantor is joint and several. It would therefore be contrary to the contractual arrangements reached between the parties if this court were to read that the liability of the appellants is joint and several. As co or joint defendants, the appellants' liability though arising differently, one as the principal borrower, the other as guarantor, is proportionately for the same sum. That proportion must be spelt out when demanding for payment and when presenting a bankruptcy notice.

[27] The appellants cannot be expected to each pay the same sum and then seek correction from the official assignee when seeking a discharge. The existence of the two bankruptcy notices with similar terms and the same amount drives home the appellants' contention that these notices are indeed, invalid. If both appellants were to pay up the same amount as they are required to do under the bankruptcy notices, the respondent would effectively be very much overpaid. Clearly, the sum stipulated in both bankruptcy notices are inaccurate and do not accord with the terms of the summary judgment.

A CONCLUSION

[28] For all the reasons adumbrated above, we unanimously allowed both the appeals. The decisions of the learned High Court judge in respect of both appeals are set aside and the decisions of the learned SAR are restored.

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Both appeals allowed, decision of the learned High Court judge set aside and decision of the learned senior assistant registrar restored.

Reported by Nisha Paran

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